Supreme Court, U.S.
FILED
JAN 31 1991
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-971

In the Supreme Court of the United States

OCTOBER TERM, 1990

AVESTA AB, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States International Trade Commission erred in rejecting petitioners' request to review an antidumping order under Section 751(b)(1) of the Tariff Act of 1930, 19 U.S.C. 1675(b)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 914 F.2d 232. The opinion of the Court of International Trade (Pet. App. 12a-30a) is reported at 689 F. Supp. 1173.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1990. The petition for a writ of certiorari was filed on December 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Tariff Act of 1930, 19 U.S.C. 1671 *et seq.*, the United States must impose antidumping duties[1] on imports when the Department of Commerce "determines that a class or kind of merchandise is being, or is likely to be, sold in the United States at less than its fair value," and the United States International Trade Commission (Commission) "determines that * * * an industry in the United States * * * is being materially injured * * * by reason of imports of that merchandise." 19 U.S.C. 1673; see 19 U.S.C. 1673d. Such duties, however, are not irrevocable. Under Section 751(a) of the Act, 19 U.S.C. 1675(a), the Department of Commerce periodically reviews whether there have been sales at less than fair market value and may revoke an antidumping order after determining that such sales have not occurred within the last three years. See 19 C.F.R. 353.25.

Moreover, under Section 751(b)(1) of the Act, 19 U.S.C. 1675(b)(1),

> [w]henever the * * * Commission receives information concerning, or a request for review of, * * * an affirmative [injury] determination made under section * * * 1673d(b) * * * of this title, *which shows changed circumstances sufficient to warrant a review of such determination*, it shall conduct such a review after publishing notice of the review in the Federal Register. [Emphasis added.]

In connection with such requests, the Commission solicits comments from interested parties. See 19 C.F.R. 207.45(b). Under the Commission's regulations, asserted changed circumstances—in order to trigger further review—must sug-

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[1] As petitioners note, "[d]umping is defined as price discrimination between international markets." Pet. 2 n.2.

gest that revocation of the antidumping order would not lead to a recurrence of material injury to the domestic injury. 19 C.F.R. 207.45(a). Moreover, such asserted changes may not include those changes that are the natural and direct consequence of imposition of the challenged antidumping order. See, *e.g.*, *A. Hirsh, Inc.* v. *United States*, 737 F. Supp. 1186, 1188 (Ct. Int'l Trade 1990). After an investigation, the Act authorizes the Commission to "revoke, in whole or in part, * * * an antidumping order." 19 U.S.C. 1675(c).

2. In 1973, the United States Tariff Commission (the Commission's predecessor) determined after an investigation that "an industry in the United States is being injured by reason of the importation of stainless-steel plate from Sweden being sold at less than fair value." Pet. App. 44a. Petitioners, the Swedish producer and United States importer of that product, objected to the Commission's determination and resulting antidumping order issued under 19 U.S.C. 1673d. Pet. App. 43a-48a.

In 1985, petitioners filed with the Commission a request to review that antidumping order under Section 751(b)(1) of the Act, 19 U.S.C. 1675(b)(1). Petitioners claimed the following four "changed circumstances" warranted the Commission's review of the previously adopted antidumping order: (1) petitioner's purchase of a production plant in the United States; (2) the minimal amount of imported stainless steel plate from Sweden; (3) the restructuring of the Swedish stainless steel plate industry; and (4) the increased Swedish trade with the European Community. *Avesta AB* v. *United States*, 689 F. Supp. 1173, 1176-1177, 1181-1187 (Ct. Int'l Trade 1988). The Commission denied the request, ruling that petitioners "did not show changed circumstances sufficient to warrant a review of the 1973 injury determination regarding stainless steel plate from Sweden." *Id.* at 1177.

Petitioners then sought review of the Commission's determination before the Court of International Trade. In 1988, the Court of International Trade upheld the Commission's decision, concluding that the Commission's

> dismissal of [petitioners'] request for review and modification or revocation of a 12-year old finding of dumping against stainless steel plate from Sweden was reasonable and not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *."

Avesta AB v. *United States*, 689 F. Supp. at 1191 (quoting 19 U.S.C. 1516a(b)(1)(A)). The court first agreed with the Commission that petitioners "failed to show how the 1976 acquisition [of a production plant in the United States] has affected the quantity of Swedish steel imports." 689 F. Supp. at 1182. Consequently, the court held that the Commission's "conclusion that the 1976 acquisition did not constitute a changed circumstance sufficient to warrant review was reasonable and had a rational basis in fact." *Id.* at 1183. The court next upheld the Commission's determination that the asserted decline in Swedish imports was "simply an anticipated result of the issuance of the antidumping order," *id.* at 1184, and agreed that the restructuring of the Swedish stainless steel industry would not inevitably "lead to a decline in exports," *id.* at 1185. Finally, the court concluded petitioners had "failed to show the [Commission] that the Trade Agreement [between Sweden and the European Community] led to significant changes in Swedish exports to the EC and thereby affected the volume of imports of hot-rolled stainless steel plate into the United States." *Id.* at 1187.[2]

3. In February 1987, while petitioners' action was pending before the Court of International Trade, petitioners

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[2] Petitioners sought no further review of the court's judgment.

filed with the Commission a second request to review the antidumping order under Section 751(b)(1) of the Act, 19 U.S.C. 1675(b)(1). Pet. App. 34a. Apart from renewing the "changed circumstances" arguments previously rejected by the Commission, petitioners alleged that

> U.S. producers are highly protected due to the negotiation and implementation of "voluntary restraint agreements" (VRAs) with those countries whose producers are the major foreign supplier to the United States market.

Id. at 35a.[3] Petitioners also claimed that "Sweden supplies U.S. demand for cold-rolled plate of widths which U.S. firms are unable to supply," and that "[s]everal patented types of stainless steel plate that did not exist in the 1970s and that are not produced in the U.S. are being exported from Sweden to the U.S." *Ibid.*

In June 1987, the Commission denied petitioners' renewed request, concluding that petitioners have not shown "changed circumstances sufficient to warrant institution of a review investigation." Pet. App. 39a. The Commission reiterated that "petitioners have offered no legally sufficient reason why the current levels of plate imports are the result of anything other than import relief." *Id.* at 36a. In that regard, the Commission also found that "the level of imports from Sweden has not decreased since [petitioners'] purchase [of a production plant in this country]." *Id.* at 37a. Similarly, the Commission determined that petitioners failed "to support their assertion that exporters have significantly altered their long-term practices with regard to exports of plate to the United States." *Ibid.*

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[3] Petitioners noted that "Sweden has not entered into a VRA with the U.S. and its exports to the U.S. remain subject to antidumping and countervailing duties." Pet. App. 35a.

Turning to petitioners' claim that they were exporting "specialty types of stainless steel plate that are not produced in the United States," Pet. App. 37a, the Commission stated that

> [s]imply because a new composition or size is produced—and even patented—does not make it sufficiently different in its characteristics and uses from other types of stainless steel plate to warrant a finding that there is no domestic like product.

Id. at 37a-38a. With respect to petitioners' reliance on the existence of VRAs, the Commission found the following "flaws": first, "because there is no VRA in effect with Sweden, the Swedish producer may continue to export to the United States in whatever quantities it chooses," *id.* at 38a; and second, "the existence of VRAs does not mean that the U.S. stainless steel industry is any less vulnerable to the impact of dumped imports," *ibid.*[4]

4. In October 1989, the Court of International Trade again held that

> the Commission's determination regarding [petitioners' request] for review of the 1973 finding of dumping of stainless steel plate from Sweden was not arbitrary, capricious or an abuse of discretion and was in accordance with law.

Pet. App. 30a. The court reviewed each of the "changed circumstances" asserted by petitioners and concluded that the record fully supports the Commission's determination that none—either considered separately or in combination—called for a review of the antidumping order under

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[4] The Commission again rejected petitioners' assertion that "the European market is a growing market for its plate exports," Pet. App. 38a, and that "a restructuring of the Swedish stainless steel industry" called for further review of the underlying antidumping order, *id.* at 39a.

Section 751(b)(1) of the Act, 19 U.S.C. 1675(b)(1). Pet. App. 18a-30a.[5]

5. In September 1990, the court of appeals affirmed. Pet. App. 1a-10a. In the court of appeals, petitioners contended that "'*a reasonable appearance*' of changes in circumstances should be the rule of decision regarding the sufficiency of alleged changes to warrant a review [under Section 751(b)(1)]." Pet. App. 5a. The court acknowledged "that the critical language in section 751(b) contains less than exacting standards of decision." *Id.* at 6a. After "canvassing the legislative history and discernable [*sic*] congressional intent," however, the court determined that "Congress's knowing choice of the 'sufficient to warrant review' language in section 751(b) manifests its intent that the review process continue to proceed on a case-by-case basis." *Id.* at 6a-7a. The court therefore concluded that the Commission's

> finding that [petitioners] had not established changed circumstances sufficient to warrant review was, in fact, an exercise of discretion predicated upon judgment anchored in the language and spirit of the relevant statutes and regulations. As such, its conclusion was in no sense an error of law.

Id. at 8a-9a (internal quotation marks and citation omitted). Accordingly, the court rejected petitioners' proposed legal standard, holding that "Congress delegated the decision as to what constitutes a change in circumstances sufficient to warrant a review investigation to the discretion of the [Commission] on a case-by-case basis." *Id.* at 6a.

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[5] In so concluding, the court found that the Commission "examined the relevant data and articulate[d] a satisfactory explanation for its action." Pet. App. 18a.

Petitioners also contended that they had shown sufficient changed circumstances to warrant a review investigation, and thus the Commission's decision was arbitrary and capricious. The court concluded, "after independently assessing the record and arguments before it," that the Commission's "determination that [petitioners] had not demonstrated changes sufficient to warrant review was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Pet. App. 9a. In closing, the court of appeals stated that "[f]urther elaboration, in light of the trial court's thorough and well reasoned examination of this issue, * * * would only add needless redundancy." *Id.* at 9a-10a (citation omitted).

ARGUMENT

1. Petitioners principally contend that Congress, in enacting Section 751(b)(1) of the Act, 19 U.S.C. 1675(b)(1), "intended that only a low threshold showing would be sufficient to obtain review [of an antidumping order]." Pet. 14; see *id.* at 11-22. Under that statute, the Commission must initiate review of an antidumping order when the requesting party presents "information * * * which shows changed circumstances sufficient to warrant a review of such [an order]." 19 U.S.C. 1675(b)(1). The particular statutory language, as the court of appeals recognized, "contains less than exacting standards of decision." Pet. App. 6a. Accordingly, Congress has delegated to the United States International Trade Commission the task of implementing its charged responsibility to oversee and modify antidumping duties imposed under the Tariff Act.

In discharging that mandate, the Commission has properly refrained from implementing petitioners' suggested "low threshold" standard (Pet. 14, 16), particularly where, as here, "Congress carefully limited the availability of § 1675(b)

investigations," *Avesta AB* v. *United States*, 689 F. Supp. at 1180. As Congress has noted, a change such as a decline in imports, rising prices, or improved performance by the domestic industry does not warrant a review investigation because "the existence of an antidumping order is a discipline on the pricing practices of foreign manufacturers [and] * * * the order offsets the effects of dumping." H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 182-183 (1984). The Commission has therefore determined that asserted changed circumstances—in order to ground further review—must suggest that revocation of the antidumping order would not lead to a recurrence of material injury to the domestic industry. 19 C.F.R. 207.45(a). Moreover, such asserted changes may not include those changes that are the natural and direct consequence of imposition of the challenged antidumping order. See, *e.g.*, *A. Hirsh, Inc.* v. *United States*, 737 F. Supp. 1186, 1188 (Ct. Int'l Trade 1990). Accordingly, as both the Federal Circuit and the Court of International Trade have held, the Commission's implementation of the statutory standard is consistent with Congress's directive and is otherwise unexceptionable. See, *e.g.*, Pet. App. 6a-9a; *id.* at 17a-18a; *A. Hirsch, Inc.* v. *United States*, 737 F. Supp. at 1188; *Avesta AB* v. *United States*, 689 F. Supp. at 1178-1181.[6]

2. Petitioners also assert (Pet. 11-12, 14) that the Commission's implementation of Section 751(b) conflicts with the federal government's obligations under the Antidumping Code of the General Agreement on Tariffs and Trade. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT Code), *opened for signature* Apr. 12, 1979, 31 U.S.T. 4919,

[6] Indeed, as the court of appeals pointed out, Congress revised Section 751 in 1984 but "left untouched the *ad hoc* nature of [Commission] decisions to institute review." Pet. App. 7a; see Resp. Br. in Opp. 10-17.

T.I.A.S. No. 9650 (entered into force Jan. 1, 1980). Petitioners did not raise this issue in the courts below, and they have therefore not preserved it for review. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, this belated point is meritless. First, any such conflict would be immaterial. In the Trade Agreements Act of 1979, Congress has expressly stated that "no provision of any trade agreement [including the GATT Code] * * * which is in conflict with any statute of the United States shall be given effect under the laws of the United States." 19 U.S.C. 2504(a). Second, the Commission's standard is in fact consistent with the GATT Code's requirement that an antidumping order remain in effect "to the extent necessary to counteract dumping which is causing injury." GATT Code, art. 9, ¶ 1, 31 U.S.T. at 4933. Under the Commission's standard, sufficient changed circumstances must suggest that revocation of the antidumping order would not lead to a recurrence of material injury to the domestic injury. 19 C.F.R. 207.45(a).

3. Finally, petitioners contend that the court of appeals, in rejecting their challenge to the Commission's decision, "failed to conduct any meaningful review of [that] decision." Pet. 23; see *id.* at 23-25. That contention is off the mark. The court of appeals explicitly concluded, "after independently assessing the record and arguments before it," that the Commission's "determination that [petitioners] had not demonstrated changes sufficient to warrant review was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Pet. App. 9a. Moreover, the court of appeals took note of the "trial court's thorough and well-reasoned examination of this issue," *ibid.*, and therefore "adopt[ed] the examination and reasoning of that opinion as its own," *id.* at 10a; see *id.* at 18a-30a (opinion of the Court of International Trade).

In any event, this Court has long held that the responsibility for assessing a record to determine whether an agency's decision is reasonable lies primarily in the lower courts. See, *e.g.*, *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). That prudential principle applies a fortiori to instances where, as here, both the trial court and the court of appeals concur in sustaining the agency's decision under the more deferential arbitrary and capricious standard. See 19 U.S.C. 1516(b)(1)(A). On the record presented, petitioners have offered no sound basis for this Court to depart from its practice of declining to review the concurrent assessments of an administrative record by two lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991 - 282-061/20,041